NO. 48936-8-II

In the Court of Appeals of the State of Washington
Division 2

CITY OF TUMWATER, Respondent

v.

ALAN LICHTI, Petitioner

PETITIONER'S BRIEF

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A) ASSIGNMENT OF ERROR

Trial court gave an erroneous definition of "exert unauthorized control" in the jury instructions by omitting the "nature of custodian" element, thereby relieving the City of Tumwater of proving all necessary elements of the crime of Theft in the Third Degree, and thereby warranting reversal of Mr. Lichti's conviction and remand for a new trial.

B) ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Was the jury instruction defining "exert unauthorized control" provided by the trial court erroneous?

2. Did Mr. Lichti properly object to the "exert unauthorized control" jury instruction?

3. Did the giving of the "exert unauthorized control" jury instruction constitute manifest error affecting a constitutional right?

4. Did the City of Tumwater prove beyond a reasonable doubt that the trial court's erroneous definition of "exert unauthorized control" did not contribute to the guilty verdict?

C) STATEMENT OF THE CASE

Alan L. Lichti, a defendant in a criminal jury trial, was accused of one count of Theft in the Third Degree. CP 9. At trial, the jury heard evidence that that Mr. Lichti purchased an Acer laptop computer with cash from Wal-Mart. CP 54, 169-70, 172, 191, 213. Mr. Lichti drove to Wal-

Mart in his white Ford Focus. CP 58, 185-86, 213. The jury also heard Mr. Lichti testify he went home, placed the laptop in his bedroom, left the keys to the Focus on his computer desk, and then left his house driving a different vehicle. CP 213-15.

Later that same day, another individual—a man in a yellow shirt, identified by Mr. Lichti as his former roommate "William Lee"—approached Wal-Mart's return counter and presented a laptop box and receipt, seeking a cash refund. CP 55, 58, 171-72, 215-16. Wal-Mart accepted the return and provided the cash refund to the man in the yellow shirt. CP 170. Later, Wal-Mart discovered the laptop box contained an older, broken HP laptop, and did not contain a newly-purchased functioning Acer laptop. CP 167. Although neither the receipt nor the box were introduced into evidence, the jury heard testimony that the box and receipt matched Mr. Lichti's purchase earlier in the day. CP 169-70, 174. Furthermore, although no CCTV video was introduced into evidence, still photographs from the video and testimony were presented that the video showed the man in the yellow shirt was associated with a white Ford Focus in the Wal-Mart parking lot, and that the Focus appeared to be the same vehicle earlier associated with Mr. Lichti, and that the Focus had a license plate that indicated it was registered to Mr. Lichti. CP 57, 168-69, 187.

The investigating officer also testified a man called him from a telephone number that had previously been described to him by a woman located at Mr. Lichti's address as Mr. Lichti's telephone number. CP 112-13, 204-05. The caller identified himself as Mr. Lichti and, unprompted, "admitted to swapping out the new computer for an old broken computer" and that he "had a friend," known by his street name "Tennessee," "return it for money." *Id.* Mr. Lichti testified he was not that caller. CP 216.

Mr. Lichti also testified that Mr. Lee, the man in the yellow shirt, as his roommate had access to his Focus, and had access to his bedroom where he put the Acer laptop. CP 215-16. Mr. Lichti also testified that when he returned home, the Acer laptop was missing, surmising that Mr. Lee had taken it. *Id.* No evidence was presented that Mr. Lichti retained the Acer laptop or received any money from the man in the yellow shirt.

At trial, the District Court instructed the jury that to convict Mr. Lichti of Theft, the jury would have to find the "proved beyond a reasonable doubt...[t]hat...the defendant wrongfully obtained or exerted unauthorized control over property of another." CP 70. The District Court separately defined "exert unauthorized control" in the jury instructions as "having any property in one's possession, custody or control, to secrete, withhold, or appropriate the same to his own use or to the use of any other person other than the true owner or person entitled thereto." CP 71. During

closing arguments, the City discussed that definition of "exert unauthorized control," but did not discuss the definition of "wrongfully obtains." CP 250-51. The jury found Mr. Lichti guilty. CP 79. Mr. Lichti appealed that conviction. CP 5.

The Superior Court, acting in its appellate capacity, affirmed the judgment of conviction. CP 399-401. Mr. Lichti sought discretionary review from this Court. CP 402-03. Mr. Lichti's Motion for Discretionary Review was granted. *See* Ruling Granting Mot. for Discr. Rev, dated July 2016.

D) ARGUMENT

1. Trial court gave an erroneous definition of "exert unauthorized control" in the jury instructions.

"Whether a jury instruction correctly states the applicable law is a question of law that [appellate courts] review de novo." *State v. Linehan*, 147 Wn.2d 638, 643 (2002). "Jury instructions must be relevant to the evidence presented." *Id.* "Before the jury can be instructed on and allowed to consider the various ways of committing a crime, there must be sufficient evidence to support the instructions." *Id.* at 653. "Jury instructions, taken in their entirety, must inform the jury that the [government] bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt." *Id.* "Jury instructions that

omit essential elements of the crime charged relieve the [government] of this burden, for they permit the jury to convict without proof of the omitted elements." *Id.* at 654. "Therefore, such instructions violate due process" and giving such instructions is error of constitutional magnitude. *Id.*

"Theft means: (a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services." RCW 9A.56.020(1).

> "Wrongfully obtains" or "exerts unauthorized control" means:
>
> (a) To take the property or services of another;
>
> (b) Having any property or services in one's possession, custody or control as bailee, factor, lessee, pledgee, renter, servant, attorney, agent, employee, trustee, executor, administrator, guardian, or officer of any person, estate, association, or corporation, or as a public officer, or person authorized by agreement or competent authority to take or hold such possession, custody, or control, to secrete, withhold, or appropriate the same to his or her own use or to the use of any person other than the true owner or person entitled thereto; or
>
> (c) Having any property or services in one's possession, custody, or control as partner, to secrete, withhold, or appropriate the same to his or her use or to the use of any person other than the true owner or

> person entitled thereto, where the use is unauthorized by the partnership agreement.

RCW 9A.56.010(22). "Subsection (b) is commonly referred to as theft by embezzlement." *Linehan*, 147 Wn.2d at 645. "Washington Pattern Jury Instruction 79.02...reads, in relevant part: [Wrongfully obtains means to take wrongfully the property or services of another.] [To exert unauthorized control means, having any property or services in one's possession, custody or control, as a _____, to secrete, withhold, or appropriate the same to his or her own use or to the use of any person other than the true owner or person entitled thereto.]" *Id.* at 652 (internal citations omitted). "The Note on Use states, 'use the bracketed material as applicable'." *Id.* (internal citation omitted). "The blank in the second paragraph is to be filled in with the 'nature of custodian of the property' from the list set forth in" RCW 9A.56.010(22)(b). *Id.* (internal citation omitted). If a "trial court...use[s] the embezzlement definition, it should...require the [government] to allege and prove the appropriate relationship or agreement between [the defendant] and the [alleged theft victim] and instruct[] the jury accordingly." *Id.* at 653. "To do otherwise [is] to relieve the [government] of its burden to prove every element of the offense." *Id.*

The trial court in *Linehan* instructed the jury "[t]o exert unauthorized control means, having any property or services in one's possession, custody or control, and to secrete withhold or appropriate the same to his or her own use or to the use of any person other than the true owner or person entitled thereto." *Id.* at 652. This jury instruction was found to be erroneous in that it misstated the law by omitting the "nature of custodian" element. *Id.* at 653.

Here, the trial court instructed the jury "[t]heft means to wrongfully obtain or exert unauthorized control over the property of another, or value thereof, with intent o deprive that person of such property." CP 69. The trial court instructed the jury "[w]rongfully obtains means to take wrongfully the property or services of another." CP 72. And the trial court instructed the jury "[t]o exert unauthorized control means, having any property in one's possession, custody, or control, to secrete, withhold, or appropriate the same to his or her own use or to the use of any person other than the true owner or person entitled thereto." CP 71.

The trial court here omitted the "nature of custodian" element from the definition of "exert unauthorized control." *See* CP 71. The trial court's instruction was virtually identical[1] to the instruction given in *Linehan*.

[1] The *Linehan* instruction did include a reference to "services" that the instruction here did not. *Compare* 147 Wn.2d at 652 *with* CP 71. However, in all other respects, the two instructions read the same.

Because the instruction given in *Linehan* was found to be erroneous, the instruction here is erroneous.

Moreover, because the erroneous instruction defining "exert unauthorized control" relieved the City of Tumwater of proving every element of Theft in the Third Degree, the error is of constitutional magnitude.

"[I]f trial error is of constitutional magnitude, prejudice is presumed." *State v. Coristine*, 177 Wn.2d 370, 380 (2013) (internal citation omitted). "Reversal is required unless the error was [constitutionally] harmless." *Linehan*, 147 Wn.2d at 653.

Mr. Lichti therefore requests this Court reverse his conviction and remand for a new trial.

2. Mr. Lichti properly objected to the "exert unauthorized control" jury instruction.

Generally, "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). "The rule reflects a policy of encouraging the efficient use of judicial resources." *State v. Scott*, 110 Wn.2d 682, 685 (1988). CrRLJ 6.15(b) "requires that timely and well stated objections be made to instructions given or refused in order that the trial court may have the opportunity to correct any error." *Id.* at 685-86 (internal citation omitted). Appellate courts "on many

occasions...refuse[] to review asserted instructional errors to which no meaningful exceptions were taken at trial." *Id.* at 686.

However, because the "purpose of requiring an objection in general is to apprise the trial court of the claimed error at the time when the court has an opportunity to correct the error," where "the purpose of the rule to justify requiring an objection as a prerequisite to appellate review" is not furthered, an appellate court may review a claim of error even in the absence of a clear objection. *State v. Moen*, 129 Wn.2d 535, 547 (1996).

For example, when "a trial court [is] able to make a determination as to the admissibility of questioned [rebuttal] testimony prior to its introduction at trial" when hearing a "motion in limine" "set[ting] forth the legal basis for the objection to the rebuttal evidence and a complete record of the motion argument made," and the "trial judge [actually] ma[kes] a final ruling," "defense counsel [is] not required to lodge a subsequent objection to the rebuttal evidence at the time of its admission." *State v. Kelly*, 102 Wn.2d 188, 192-93 (1984). "Unless the trial court indicates further objections are required when making its ruling, its decision is final, and the party losing the motion in limine has a standing objection." *Id.* at 193.

Here, trial counsel for Mr. Lichti proposed "a variation of pattern instruction 70.11" that specifically *excluded* "exerted unauthorized control" as a means of committing the crime. CP 229, 314-15, 337. Trial counsel for the City proposed a variation on WPIC 70.11 that specifically *included* the "exerted unauthorized control" language." CP 229, 314-15, 326, 360.

Trial counsel for Mr. Lichti argued the "exerted unauthorized control" language should be omitted "to limit the jury's confusion about what these words mean" and noted "there ha[d] been [no] evidence presented related to exerting unauthorized control." CP 230. This constituted a timely and well-stated objection to the City's proposed jury instruction modeled on WPIC 70.11.

Initially, the trial court was inclined to give Mr. Lichti's proposed WPIC 70.11 instruction. CP 230. However, after further argument by counsel for the City, the trial court "changed [its] mind" and ruled "70.11 will include the wrongfully obtained or exerted unauthorized control." CP 233. The trial court did not invite further argument from the parties. The trial court did not explicitly or implied indicate this was a tentative ruling, or indicate trial counsel for Mr. Lichti was expected to make further objection as to this issue. In short, the trial court's ruling was final.

Moreover, the parties appeared to have treated the trial court's ruling adopting the City's proposed elements instruction which contained the "exerted unauthorized control" language as having also adopted the City's proposed definition instruction. Specifically, trial counsel for Mr. Lichti, in discussing "defense instruction 79.02 where it defines what wrongfully obtains means," proposed it "should be *added* to the definition of exert unauthorized control." CP 237 (emphasis added). The use of the term "added" would not make sense unless trial counsel for Mr. Lichti believed the trial court had already ruled this instruction would be given. Furthermore, in the same discussion, trial counsel for the City opined, "[w]e've already gone over this." CP 237.

Therefore, when the issue of the City's proposed definition of "exert unauthorized control" was discussed, the earlier objection operated as a standing objection. Had the trial court adopted Mr. Lichti's proposed elements instruction, the "exert unauthorized control" language would not have been included in the jury instructions. *See* CP 314-15, 326. Naturally, then, the *definition* of "exert unauthorized control" would not have been included.

Furthermore, the trial court had the opportunity to consider whether the "exert unauthorized control" language should appear in the jury instructions after having heard an objection from trial counsel for Mr.

Lichti, and before making a final ruling on that issue. Therefore, the purpose of the contemporaneous objection rule would not be furthered by its application here. Thus, this Court should consider Mr. Lichti's claim of error.

3. The trial court's providing "exert unauthorized control" jury instruction constitutes manifest error affecting a constitutional right.

"A party may raise [a] claim[of] error[] for the first time on appeal" where that error constitutes a "manifest error affecting a constitutional right." RAP 2.5(a)(3). That is, even if Mr. Lichti's trial counsel's failure to separately object to the City's proposed instruction defining "exert unauthorized control" would generally operate as a waiver on appeal, this Court should still consider the claim of error if that error is manifest and affects a constitutional right.

"[I]nstructional errors [that] obviously affect a defendant's constitutional rights by violating an explicit constitutional provision or denying a defendant a fair trial through a complete verdict" constitute "manifest constitutional errors." *State v. O'Hara*, 167 Wn.2d 91, 103 (2009). "In contrast, instructional errors...that [do] not constitute[] manifest constitutional error" are those where "one can imagine justifications for defense counsel's failure to object or where the jury could still come to the correct conclusion." *Id.*

"Due process requires a criminal defendant be convicted only when every element of the crime charged is proved beyond a reasonable doubt." *Id.* at 105. "To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case." *Id.* Although "courts are [not] constitutionally obligated to define technical terms," courts *are* constitutionally obligated to define technical terms *correctly* if the terms are defined at all. *Id.* at 106. "Omitting an element of the crime charged" constitutes "manifest constitutional error[] in jury instructions." *Id.* at 103.

Here, the trial court instructed the jury with an erroneous definition of "exert unauthorized control" by failing to include any nature of custodian relationship as required by RCW 9A.56.010(22)(b). *See Linehan*, 147 Wn.2d at 653. By failing to include the "nature of custodian" in the definition of "exert unauthorized control," the trial court "relieve[d] the [City] of its burden to prove every element of the offense." *Id.* Relieving the City of its burden to prove an element of the crime charged constitutes manifest constitutional instructional error. Therefore, this Court must consider Mr. Lichti's claim of error under RAP 2.5(a)(3), even if the contemporaneous objection rule would otherwise permit the Court to exercise its discretion to refuse to review the claim of error.

4. Trial court's erroneous definition of "exert unauthorized control" contributed to the jury verdict.

"[I]f trial error is of constitutional magnitude, prejudice is presumed, and the [government] bears the burden of proving it was harmless beyond a reasonable doubt." *State v. Coristine*, 177 Wn.2d 370, 380 (2013) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). The "test for determining whether a constitutional error is harmless [is 'w]hether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained'." *State v. Brown*, 147 Wn.2d 330, 341 (2002) (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)). That is, an appellate court must "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Id.* "When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence." *Id.* In the context of an erroneous definition of "exert unauthorized control" and a proper definition of "wrongfully obtains," the test is whether uncontroverted evidence supports the element of "theft" on the "wrongfully obtains" basis. *See Linehan*, 147 Wn.2d at 654.

Here, the evidence was uncontroverted that Mr. Lichti purchased an Acer laptop computer with cash from Wal-Mart. CP 169-70, 172, 191,

213. And the evidence was uncontroverted that Mr. Lichti drove to Wal-Mart in his white Ford Focus. CP 58, 185-86, 213.

Furthermore, the evidence was uncontroverted that the man in the yellow shirt went to Wal-Mart later that day in Mr. Lichti's Focus with the laptop box *sans* the Acer laptop, together with the receipt, and obtained a cash refund from Wal-Mart. CP 55, 59, 167, 170-173, 215-16.

However, the evidence was anything but uncontroverted that Mr. Lichti induced the man in the yellow shirt to conduct that fraudulent return, or otherwise participated in that fraudulent return. Mr. Lichti was not observed at Wal-Mart at the time of the return. CP 171-72. Mr. Lichti testified he did not give the laptop, laptop box, or receipt to the man in the yellow shirt. CP 216. Mr. Lichti testified he did not retain the laptop; to the contrary, it was missing when he returned home. *Id.* Furthermore, there was no direct evidence that Mr. Lichti did retain the laptop. Mr. Lichti testified he did not receive any money from the man in the yellow shirt. *Id.* Moreover, there was no direct evidence that Mr. Lichti did receive any money. Although the jury did head testimony about a telephone call between the investigating officer and an individual who identified himself as Mr. Lichti in which the caller made a few incriminating statements, Mr. Lichti testified he was not that caller. CP 196-97, 205-06, 216.

Thus, the evidence was anything but uncontroverted that Mr. Lichti "[took] wrongfully the property or services of another." *See* CP 72.

Furthermore, the City primarily argued based upon the erroneous definition of "exert unauthorized control," not the correct definition of "wrongfully obtains." CP 250-51. Given the nature of the City's argument, together with the evidence the jury heard, the jury easily could have found the City failed to prove Mr. Lichti guilty under the correct "wrongfully obtains" definition, but that the City had proved Mr. Lichti guilty using the erroneous "exert unauthorized control" definition.

Therefore, the City will be unable to meet its burden of establishing beyond a reasonable doubt that the jury verdict would have been the same absent the erroneous definition of "exert unauthorized control." Thus, the trial court's erroneous instruction contributed to the verdict, and therefore the error was harmful.

E) CONCLUSION

The trial court gave an erroneous as a matter of law definitional instruction of "exert unauthorized control" in Mr. Lichti's Theft in the Third Degree trial. That error was of constitutional magnitude. Because either Mr. Lichti's trial counsel properly objected to the giving of that erroneous instruction, or that error was manifest, and because the City cannot establish beyond a reasonable doubt that the erroneous instruction

did not affect the jury's guilty verdict, this Court should reverse the conviction, and remand for a new trial.

DATED this 21st day of November, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing PETITIONER'S BRIEF was mailed, postage prepaid, on this 21st day of November, 2016 to counsel for Respondent, CAROL LAVERNE at the Thurston County Prosecuting Attorney's Office at 2000 Lakeridge Dr SW Bldg 2, Olympia, WA 98502 and to the petitioner, ALAN LICHTI, at 3425 Shincke Rd NE Apt B, Olympia, WA 98506.

/s/ Christopher Taylor
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CR TAYLOR LAW, P.S.

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